UNIVERSITI SAINS MALAYSIA v. KU ZILATI KU SHAARI & ORS AND ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL SUIT NOS: 22-610-2010 & 22-611-2010]
5 DECEMBER 2022

Abstract – *The law relating to the setting aside of a default judgment is well settled; a defence on the merits must be disclosed before the court could consider an application to set aside a default judgment, more so, where there is proof that the judgment has been obtained regularly. The party seeking to set aside the default judgment herein, which was shown to have been regularly obtained, were not only less than forthright, but was also delayed for a near-decade-long without satisfactory explanation in their application, warranting dismissal of such application.*

CIVIL PROCEDURE: *Judgments and orders – Judgment in default – Application to set aside – Whether judgment regularly obtained – Whether writ and statement of claim properly served at right address – Whether service proven – Whether there was defence on merit warranting setting aside of default judgment – Whether cogent reasons given for delay beyond 30-day rule under O. 42 r. 13 of Rules of Court 2012 – Whether delay reasonable*

The first defendant in Suit 610 ('first defendant') and the first defendant in Suit 611 were wife and husband. The suits were heard together and the decision on the application in Suit 610 would bind the parties in the application in Suit 611. Pursuant to a fellowship agreement, the plaintiff, Universiti Sains Malaysia ('USM'), gave fellowship scholarships to the first defendant in Suit 610 and the first defendant in Suit 611, for which they were bound to serve USM for seven years after they graduated. Clause 8 of the fellowship agreement provides that, if the first defendant leaves USM before the end of the seven-year period, she was bound to pay USM damages that included all the monies USM had spent on her as well as the compoundable interests on any amount that was due. Upon attaining fellowships, few months after reporting to work at USM as a lecturer, the first defendant resigned. USM demanded the amount due from the first defendant before proceeding to file the suits. On 6 September 2010, USM served the writ and statement of claim on the first defendant to her address at Taman Kempas, Sungai Petani, Kedah ('Taman Kempas address') as stated in the fellowship agreement. The first defendant responded referring to USM's writ service letter and also stated Taman Kempas address as her address. USM replied to the first defendant by the solicitor's letter of 11 October 2010 advising the first defendant to enter an appearance, failing which judgment would be entered against her and execution proceedings would ensue. The first

defendant responded to USM's solicitor's letter with two letters, which again, were written with Taman Kempas address as her address. When the fist defendant failed to enter appearance to the writ, default judgment was entered against the first defendant and the sealed judgment was sent to the Taman Kempas address to which the first defendant jointly responded with her husband. More than four years later, USM issued the first bankruptcy notice ('BN') against the first defendant followed by the creditor's petition. Following written negotiation communications between the first defendant and USM, in September 2016, USM withdrew the first bankruptcy proceedings against the first defendant. When the first defendant did not satisfactorily fulfil the settlement arrangement, USM obtained leave to execute the judgment as it had been six years after the judgment was entered and proceeded to issue the second BN against the first defendant. However, the second BN was discontinued by USM. The defendants subsequently filed their respective applications to set aside the default judgments.

Held (dismissing first defendant's application with costs):

(1) USM's writ and statement of claim were properly served on the first defendant as it was served on the address stated in the fellowship agreement as the first defendant's address. USM had produced the Pos Malaysia statement and receipt to prove that the writ and statement of claim were sent by AR registered post to the first defendant's address. The first defendant's response to USM's writ service letter and USM's solicitor's letter showed that the Taman Kempas address was the proper address to communicate with the first respondent and reinforced the finding of fact that the first defendant received the writ and statement of claim. Based on the overwhelming documentary evidence that the writ and statement of claim were properly served on the first defendant, the default judgment was regularly obtained. (paras 19-22, 50, 51 & 71)

(2) The assertions made by the first defendant that she did not receive the writ and statement of claim and could not enter appearance due to USM's failure to serve on her the writ and statement of claim and only knew about the default judgment when she was served with the two bankruptcy notices, were not only untenable, but were – on the balance of probabilities – false. These untruthful averments had cast much doubt on the first defendant's probity. (paras 69 & 70)

(3) The first defendant had not produced an 'arguable or triable issue' that warranted the setting aside of the default judgment. There was also no draft defence containing defence on the merits exhibited for the court to consider. Instead, the first defendant made averments that she had been in communication with USM's legal counsel on the arrears due and had discussed the matter with USM. She also averred that she moved from USM to Universiti Teknologi Petronas ('UTP') and that the Ministry of

Higher Education could extinguish the balance of her loan by transferring her service contract to UTP as a reciprocal action between Petronas and the Government of Malaysia. These averments did not tantamount to defence on the merits. (paras 53, 54 & 71)

(4) Order 42 r. 13 gives the first defendant 30 days from the receipt of the judgment to set it aside. This is a mandatory rule, and any delay beyond the 30-day rule must be cogently explained. The first defendant applied to set aside the judgment approximately ten years from the service of the judgment and there was no satisfactory explanation given for the unreasonably long delay in filing the application to set aside the judgment. (paras 65, 67 & 68)

Case(s) referred to:

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd [2008] 3 CLJ 273 CA ***(refd)***

Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor [2003] 6 CLJ 326 HC ***(refd)***

Thye Ah Chai v. Teraju Mercu Construction & Engineering Sdn Bhd [2013] 1 LNS 312 CA ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 42 r. 13

For the plaintiff - S Kartikumar; M/s Ghazi & Lim
For the 1st defendant - Mustaqim Huzaini; M/s Ram Reza & Muhammad

Reported by S Barathi

JUDGMENT

(Application To Set Aside Judgment In Default Of Appearance)

Kenneth St James JC:

Prelusion

[1] The plaintiff (USM) gave fellowship scholarships to two of its students. For the scholarships, the students were bound to serve USM, after they graduated, for seven years. Respective fellowship agreements were signed. In time, the two students attained their fellowships. They reported for work. But within a few months, they resigned. USM then sued them under the fellowship agreements. The pertinent consequence for breaching the fellowship agreements was that the students became liable to pay USM all the monies that USM had expended on them, with interest.

[2] As the students did not enter appearances to the writs, respective judgments in default of appearance were entered against them. After that, USM executed the judgments, by taking bankruptcy proceedings against the students. There was negotiation communication between the students and USM. As a result, USM withdrew the first bankruptcy proceeding.

[3] Years passed. As the students did not satisfactorily fulfil the settlement arrangement, USM executed the default judgments again. As required by law, USM obtained the leave of court to execute the judgments after six years have passed since the judgments were entered. USM again filed bankruptcy proceedings. This time, the students filed respective applications to set aside the default judgments. Should the judgments be set aside?

Both Applications To Set Aside Are Heard And Determined Together

[4] I will refer to Penang High Court Civil Suit No. 22-610-2010 against Ku Zilati binti Ku Shaari (first defendant) and the two guarantors, as Suit 610. I will similarly refer to Penang High Court Civil Suit No. 22-611-2010 against Mokhtar bin Awang (also first defendant in that suit) and the same two guarantors, as Suit 611.

[5] It is appropriate for both applications to set aside the respective default judgments in Suit 610 and Suit 611 to be heard together. Both the fellowship agreements contained the same terms, such that both the first defendant's obligations to USM were the same. Both the fellowship agreements were entered into on the same date. The address stated for both the respective first defendant in both the fellowship agreements was the same address.

[6] The first defendant in Suit 610 and the first defendant in Suit 611 are wife and husband. The communication over the years between them and USM were also done, by-and-large, as one (together). The only difference that is relevant to note is that the respective judgment sums are different.

[7] Further, I asked counsel for both sides about this at the hearing, and they agreed that both the applications to set aside should be heard together, and that my decision on the application in Suit 610 will bind the parties in the application in Suit 611. The parties also agreed that they would make references only to the averments and exhibits in Suit 610.

[8] And so, I will write one judgment for both applications.

The Pertinent Facts And Chronology

[9] As there were communication and documentation over a period of approximately 20 years, it is helpful to summarise the pertinent facts and chronology, as disclosed in the documentary evidence.

[10] On 2 June 2000, the fellowship agreement was entered into.

[11] Clause 4(g) of the fellowship agreement obligates the first defendant to serve (work for) USM, after graduation, for no fewer than seven years from the date that she first reports for work.

[12] Clause 8 of the fellowship agreement provides that if the first defendant leaves USM before the end of the seven-year period, she is to pay USM damages that include all the monies that USM has spent on her, as well as the compoundable interest on any amount that is due.

[13] On 4 February 2008, after graduation, the first defendant reported to work at USM, as a lecturer.

[14] But on 6 May 2008 (a mere three months later), the first defendant resigned from her position.

[15] On 10 July 2008, USM demanded for the amount due from the first defendant.

[16] On 25 August 2010, USM filed these two suits. By their solicitor's letter of 6 September 2010, USM served the writ and statement of claim on the first defendant. USM sent the writ and statement of claim, by A.R. registered post, to the first defendant's address at: 182, Jalan Kempas 2, Taman Kempas, 08000 Sungai Petani, Kedah (Taman Kempas address). This Taman Kempas address is the first defendant's address that is stated in the fellowship agreement. I will refer to this cover letter serving the writ and statement of claim as "USM's writ service letter".

[17] USM exhibited the Pos Malaysia Berhad statement and receipt dated 7 September 2010, which proves that USM's writ service letter was sent by A.R. registered post to the first defendant's Taman Kempas address.

[18] By her letter of 21 September 2010, which was marked "without prejudice", the first defendant responded to USM's writ service letter. In her letter, the first defendant referred to USM's writ service letter. She also stated the Taman Kempas address as her address.

[19] As her letter was marked "without prejudice", I do not consider the content of the letter. But I can take cognisance of the fact that the first defendant responded to USM's writ service letter, and that she stated the Taman Kempas address as her address. I therefore find, on the balance of probabilities, that the Taman Kempas address was the correct address to use to serve the writ and statement of claim on her. And that she in fact received the writ and statement of claim.

[20] By their solicitor's letter of 11 October 2010, USM replied to the first defendant's letter of 21 September 2010, advising her that she must enter an appearance within the time-limit given, and that if she did not, judgment would be entered against her, and execution proceedings will ensue.

[21] The first defendant in turn responded to USM's solicitor's letter of 11 October 2010, with two letters. The first letter was her letter of 26 October 2010. The second letter was her letter of 23 November 2010. Both letters were marked "without prejudice". But both letters referred to USM's solicitor's letter of 11 October 2010. And in both letters, the first defendant again wrote the Taman Kempas address as her address.

[22] In the same vein, even though I do not consider the content of these two letters, I find, on the balance of probabilities, that the Taman Kempas address was the proper address to use to communicate with the first defendant, and that she responded to USM's solicitor's letter of 11 October 2010.

[23] On 6 July 2011, USM entered judgment in default against the first defendant.

[24] By their solicitor's letter of 21 July 2011, USM sent the sealed judgment, by registered post and certificate of posting, to the first defendant, again to the Taman Kempas address. I will refer to this cover letter serving the judgment as "USM's judgment service letter".

[25] USM, as before, exhibited the Pos Malaysia Berhad statement and receipt dated 22 July 2011, which proves that USM's judgment service letter was sent by registered post and certificate of posting to the first defendant's Taman Kempas address.

[26] The first defendant responded to USM's judgment service letter, by her letter of 20 September 2011, which referred to USM's judgment service letter. Her letter was again marked "without prejudice". This was a letter issued jointly with her husband.

[27] Again, although I do not consider the content of her letter of 20 September 2011, I make a finding of fact, on the balance of probabilities, that she received the judgment through USM's judgment service letter.

[28] More than four years later, on 1 December 2015, USM issued the first bankruptcy notice (BN) against the first defendant.

[29] By their solicitor's letter of 9 December 2015, USM purported to serve the first BN on the first defendant by hand. USM exhibited this cover letter, which contained an acknowledgment of service in the form of an illegible signature, but with a clearly hand-written NRIC number- "710103025494". This is the first defendant's NRIC number. (It is pertinent to note that on the cover letter serving the first BN issued against her husband, there was similarly an acknowledgment of service with a signature and a handwritten NRIC number – "710710115547" – which is the husband's NRIC number.)

[30] On 10 June 2016, USM filed the creditor's petition (CP) against the first defendant. USM purported to serve the CP on the first defendant, again by hand. USM similarly exhibited this cover letter, which also contained an acknowledgment of service in the form of a signature, with a clearly hand-written NRIC number-the first defendant's NRIC number. (Similarly, on the cover letter serving the CP on her husband, there was also an acknowledgment of service with a signature and the husband's NRIC number written on it.)

[31] There was further written negotiation communication between the first defendant and USM in July and August 2016.

[32] In September 2016, USM withdrew the first bankruptcy proceeding against the first defendant.

[33] The next documented communication came two years later. By their solicitor's letter of 28 June 2018, USM notified the first defendant that she was in arrears of her instalment payments. USM demanded that she pays the arrears, or execution proceedings would again be taken against her.

[34] In August 2020, USM applied for leave to execute the judgment after six years have passed from the date of the judgment. USM purported to serve the application for leave and the affidavit in support of the application on the first defendant. USM's solicitor's cover letter of 2 September 2020, serving the application and the affidavit in support contained an acknowledgment signature with the first defendant's NRIC number written on it. (It was the same for the cover letter serving these cause papers on the husband. There was an acknowledgment signature and his NRIC number written on it.)

[35] On 6 October 2020, USM obtained the order for leave to execute the judgment (after six years have passed from the judgment date).

[36] Two months later, on 31 December 2020, USM issued the second BN against the first defendant.

[37] As before, USM purported to serve this second BN on the first defendant. By their solicitor's letter of 6 January 2021, USM served, by hand, this second BN on the first defendant. USM exhibited this cover letter, which again contained an acknowledgment of service in the form of a signature, with the first defendant's hand-written NRIC number written on it. (It is the same for the cover letter serving the second BN on the husband.)

[38] In January and February 2021, there were pertinent communication emanating from the first defendant's husband that relates to both of them. This communication, which were not marked "without prejudice", in my judgment, tantamount to an admission of the judgment debt by both of them. The communication includes these statements that I am citing below:

(i) By email of 24 January 2021: "Kami menerima dokumen dari firma Ghazi & Lim baru-baru ini" (Ghazi & Lim are USM's solicitors. They were tasked with serving the relevant cause papers.) and "… kami merayu kepada pihak USM agar menarik balik notis kebankraban (*sic*) dan menawarkan penyelesaian one-off yang mampu kami bayar".

(ii) By email of 25 January 2021: "Kami memohon sekali lagi supaya pihak USM dapat menawarkan rebet yang mampu kami bayar secara one-off".

(iii) By email of 31 January 2021: "Ingin dijelaskan bahawa kami berdua berhasrat hendak menyelesaikan kes ini secepat mungkin".

(iv) By email of 15 February 2021: "Dilampirkan bukti pembayaran (Mokhtar Awang) untuk tindakan dan rujukan pihak Puan. Untuk Ku Zilati, kami akan buat pembayan (*sic*) esok".

(v) By email of 16 February 2021: "Bukti pembayaran Ku Zilati disertakan dalam attachment untuk tindakan dan rujukan pihak USM".

[39] On 24 February 2021, USM discontinued the second bankruptcy proceeding against the first defendant.

[40] On 2 March 2021, both the first defendants filed their respective applications to set aside the default judgments.

The Applicable Principles

[41] The principles governing an application to set aside a default judgment are well settled. If the default judgment was obtained irregularly, the irregularity is enough to set it aside. The default judgment should be set aside "as of right" or "as a matter of right". The Latin expression is *ex debito justitiae.*

[42] But if the default judgment was obtained regularly, then the first defendant must file an affidavit of merits, which must disclose a defence on the merits, and that the first defendant has an arguable or triable issue on the merits: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565; [1997] 3 AMR 2458 (FC).

[43] The Federal Court in *Lai Yoke Ngan* (*supra*) propounded it this way (at pp. 313 to 314 (CLJ); pp. 573 to 574 (MLJ)):

> The principle of setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed, **the defendant must file an affidavit of merits,** *ie*, the defendant must disclose by affidavit evidence that *prima facie* he has a defence on the merits. Put in another way, **the affidavit must disclose that he has an arguable or triable issue on the merits** (see *Evans v. Bartlam* [1937] AC 473) …
>
> (emphasis added)

[44] A defence on the merits means raising "an arguable or triable issue": *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32; [1989] 1 MLJ 40 (SC).

[45] And to disclose a defence with merits, a draft defence should be filed: *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326; [2003] 3 MLJ 67; [2003] AMEJ 0063 (HC).

[46] In *Pengkalen Concrete* (*supra*), His Lordship Justice Suriyadi Halim Omar puts it like this (at p. 331 (CLJ); pp. 74 to 75 (MLJ)):

> The next ingredient to be established by the defendants was whether there was a defense of merit before me for consideration, *ie*, by at least filing their draft defences …
>
> In the current case, it was indisputable that **the defendants had failed to produce that all important draft statements of defence. Without them, I was thus without any option but to find again for the plaintiff** … Common sense would convince anyone that to allow the appeal, and set aside a default judgment when no *prima facie* defence worthy of consideration was before the court, would portray the court as a lame duck prolonging the agony of all parties. **Without them before me, I could only conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff** … (emphasis added)

Was The Default Judgment Regularly Obtained?

[47] The first issue to determine is whether the default judgment was regularly obtained. Put differently, on the facts of these two suits – was the writ and statement of claim properly served on the first defendant?

[48] The first defendant avers (swears on oath) that:

(i) USM failed to serve the writ and statement of claim on her;

(ii) the Taman Kempas address was not her residential address, nor was it her address for service. She swore that the Taman Kempas address "bukan alamat kediaman dan/atau alamat penyampaian saya";

(iii) she did not enter an appearance because she did not receive the writ and statement of claim.

[49] Testing the first defendant's averments against the documentary evidence and USM's averments, I find that the first defendant's averments are unconvincing.

[50] Unfavourable to the first defendant, I find, on the balance of probabilities, that USM's writ and statement of claim were properly served on the first defendant, for the following reasons:

(i) The Taman Kempas address was the address stated in the fellowship agreement as the first defendant's address.

(ii) USM produced the Pos Malaysia statement and receipt to prove that the writ and statement of claim were sent by A.R. registered post to the first defendant's Taman Kempas address, under the cover of USM's writ service letter (dated 6 September 2010).

(iii) By her letter of 21 September 2010, the first defendant responded to USM's writ service letter, which proves that the first defendant received the writ and statement of claim. In this letter of 21 September 2010, the first defendant wrote the Taman Kempas address as her address.

(iv) USM replied to the first defendant's letter of 21 September 2010, by their solicitor's letter of 11 October 2010. The first defendant in turn responded to USM's solicitor's letter of 11 October 2010, by her letters of 26 October 2010 and 23 November 2010. And in both these reply-letters, the first defendant similarly wrote the Taman Kempas address as her address. This reinforces my finding of fact that the first defendant received the writ and statement of claim, as well as USM's solicitor's letter of 11 October 2010, at her Taman Kempas address.

[51] Since I find that the first defendant received service of the writ and statement of claim, and the first defendant failed to enter appearance as she was required to do, I hold that the default judgment was regularly obtained.

Did The First Defendant Disclose A Defence On The Merits To Warrant The Setting Aside Of The Default Judgment?

[52] Since the default judgment was regularly obtained, the next issue to determine is whether the first defendant disclosed a defence on the merits to warrant the default judgment to be set aside.

[53] On this issue of a defence on the merits, the first defendant does not produce a draft defence for the court to consider. Instead, she makes these averments:

(i) Since 2019, she has been in communication with the USM legal counsel Puan Hanum Muhamad Shkir about the arrears due in the fellowship agreement. She had on several occasions discussed the arrears due with USM, but USM in *mala fide* proceeded to take legal action against her.

(ii) She moved from USM to the Universiti Teknologi Petronas (UTP). The Ministry of Higher Education can extinguish the balance of her loan (scholarship) by transferring her service contract to UTP as a reciprocal action between Petronas and the Government Of Malaysia. (I find, however, that she does not disclose any evidence to support this assertion, not even any evidential material that infers that she could rely on this alleged arrangement between USM and UTP, as her defence to USM's claim.)

(iii) She has a defence on the merits which has a good prospect of succeeding: "saya mempunyai pembelaan yang bermerit dengan prospek kejayaan yang tinggi". (But I find that it remains a bare statement. She does not condescend to any particulars to substantiate this statement.)

[54] I find that these averments do not tantamount to a defence on the merits. The first defendant has not produced an "arguable or triable issue" that warrants setting aside the default judgment.

Was There A Delay By USM, Or By The First Defendant?

[55] Another issue that is relevant to the application to set aside is the issue of delay. The first defendant asserts that USM, in bad faith, committed an inordinate delay of 156 months before executing on the judgment, and that USM did this in order to recover a higher interest amount from the first defendant, even though she was still discussing a settlement with USM.

[56] In reply to this assertion, USM avers that:

(i) It was the first defendant who asked to pay the amount due by instalments. After some payments, the first defendant stopped paying and went into default in 2014. That was when USM took out the first bankruptcy proceeding against her. In 2016, the first bankruptcy proceeding was withdrawn on the first defendant's promise to resume paying.

(ii) Then in 2018, the first defendant went into default again. In 2020, USM obtained the leave of court to execute after six years have passed from the date of the judgment. And in 2020, USM took out the second bankruptcy proceeding against the first defendant. After further negotiations, resulting in the first defendant paying up the amount in arrears, USM withdrew the second bankruptcy proceeding.

(iii) In other words, the alleged delay of 156 months was a result of the first defendant's own doing.

[57] In any event, since USM obtained the court's leave to execute after six years have lapsed, and since the prolonged lapse of time was USM's forbearance from executing the judgment because of the first defendant's own default and request-I find that there was no inordinate delay on USM's part.

[58] Conversely, USM asserts that there is an unexplained delay by the first defendant in filing her application to set aside the default judgment.

[59] In this context, the first defendant first alleges that USM kept the fact of the judgment from her for 156 months. In other words, USM did not inform the first defendant about the judgment for 156 months. The first defendant also alleges that she got to know about the judgment only when the second BN was served on her, which was in January 2021. She alleges that

as soon as she knew about the judgment through the second BN – "sebaik saja saya mendapat tahu berkenaan dengan penghakiman tersebut melalui notis kebankrapan" – she filed the application to set aside the judgment. I am, however, compelled to note here that the first defendant filed the setting aside application only in March 2021.

[60] USM substantiates their assertion that the first defendant had inordinately delayed filing her application to set aside the judgment, by making these averments:

(i) By USM's judgment service letter (dated 21 July 2011), USM sent the sealed judgment to the first defendant's Taman Kempas address in 2011. I note here that this was about ten years before the service of the second BN in 2021.

(ii) The Pos Malaysia Berhad statement and receipt dated 22 July 2011, proves that USM's judgment service letter was sent by registered post and certificate of posting to the Taman Kempas address.

(iii) The first defendant responded to USM's judgment service letter, by her letter of 20 September 2011, which shows that the first defendant received USM's judgment service letter and the judgment, in 2011.

[61] I find USM's assertions about the first defendant's unexplained delay to be credible.

The Legal Principles On Delay In Applying To Set Aside A Default Judgment

[62] The guiding principle about delay is that delay is a factor to be considered when deciding whether to grant or refuse an application to set aside the default judgment: *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112; [2008] 3 AMR 576 (CA).

[63] How long was the delay in applying to set aside a default judgment is a relevant and important factor to consider when exercising the discretion to set aside the judgment. If the first defendant does not act "with reasonable promptitude", the court should not favour the first defendant: *Mirra Sdn Bhd v. The Ayer Molek Rubber Company Bhd* [2008] 3 CLJ 273; [2008] 2 MLJ 348; [2008] 3 AMR 281 (CA).

[64] In *Mirra* (*supra*), the Court of Appeal held:

> [7] Nonetheless, I shall venture to add that *the respondent was also guilty of delay in applying to set aside the default judgment. Under O. 42 r. 13 of the Rules of the High Court 1980 ('the RHC'), the respondent is required to apply to set aside the default judgment within 30 days from the date of receipt of the judgment order. This, the respondent failed to do within the prescribed time.* And by the time when this application was made, the appellant had taken a fresh step in filing a petition to wind up the respondent. *When the respondent had failed*

to act '(a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O. 2 r. 2(i) of the Rules of the High Court 1980' – per Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd then the court should not come to his aid in setting aside the default judgment.* (emphasis added)

[65] Order 42 r. 13 gives the first defendant 30 days from the receipt of the judgment to set it aside. It is a mandatory rule. Any delay beyond this 30-day rule must be cogently explained: *Thye Ah Chai v. Teraju Mercu Construction & Engineering Sdn Bhd* [2013] 1 LNS 312; [2014] 1 MLJ 422 (CA).

[66] In *Thye Ah Chai* (*supra*), the Court of Appeal held:

[6] *There is a plethora of authorities to the effect that O. 42 r. 13 is mandatory and that an applicant filing an application beyond the prescribed time limit is obliged to provide cogent reasons for any delay.* We need cite only one authority in support of this proposition. This court in the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 opined through the judgment of Gopal Sri Ram JCA (as he then was) in a case also involving an application to set aside a default judgment that:

> *It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.*
>
> *In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.* (emphasis added)

My Finding On Delay

[67] The default judgment was entered on 6 July 2011. I find, on the balance of probabilities, that the judgment was served on the first defendant in July 2011. But the first defendant applied to set aside the judgment in March 2021, which was approximately ten years from the service of the judgment.

[68] I therefore find that first defendant has gone way beyond the 30-day rule mandated by O. 42 r. 13, and by binding authorities. More importantly, the first defendant did not satisfactorily explain the reasons for waiting ten years to apply to set aside the judgment.

A

Three Sworn Assertions By The First Defendant That Are Incredible

[69] I am behoved to point out that there are at least three sworn assertions that were made by the first defendant that are difficult to believe. These three assertions made by the first defendant are not only untenable, but are – on the balance of probabilities – false:

B

(i) the first defendant's assertion that she did not receive the writ and statement of claim (in September 2010);

(ii) the first defendant's assertion that she could not enter an appearance because USM failed to serve on her the writ and statement of claim;

C

(iii) the first defendant's assertion that she only got to know about the default judgment when she was "recently" served with the second BN (in January 2021).

[70] Untruthful averments such as these have cast much doubt on the first defendant's probity, when I consider to exercise my discretion to, or not to, set aside the default judgment.

D

Conclusion

[71] In conclusion, for the reasons alluded to above, I find that:

E

(i) the default judgment was regularly obtained, as the documentary evidence against the first defendant overwhelmingly point to the fact that the writ and statement of claim were properly served on the first defendant;

(ii) the first defendant failed to disclose a defence on the merits in her affidavit averments, nor has she exhibited a draft defence containing a defence on the merits;

F

(iii) there was an unreasonably long delay in filing this application to set aside the judgment. And the near-decade-long delay was not acceptably explained.

G

[72] I therefore dismiss the first defendant's application to set aside the judgment dated 6 July 2011 with costs of RM3,000 to be paid by the first defendant to USM by 6 December 2022. Costs are subject to the allocator.

H

I